

HOUSE BILL No. 1714

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-6-9-4; IC 24-4.8.

Synopsis: Computer spyware. Prohibits the unauthorized installation of a computer spyware program that monitors a computer's usage and: (1) transmits usage information to another computer; or (2) displays certain advertisements in response to the computer's usage. Permits the installation of spyware only if the computer owner consents after full disclosure of: (1) the spyware's purpose; and (2) a method of uninstalling the spyware. Authorizes a web site owner, a trademark or copyright holder, or an authorized Internet advertiser harmed by spyware to bring a civil action against the person who unlawfully installed the spyware. Permits a person who brings a cause of action for unlawful spyware installation to receive injunctive relief and the greater of actual damages or \$10,000 per violation. Permits a court to award treble damages if the violation is knowing or intentional, and permits the award of attorney's fees and costs. Requires the consumer protection division of the attorney general's office to receive reports of unauthorized spyware installation.

Effective: July 1, 2005.

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January 19, 2005, read first time and referred to Committee on Technology, Research and Development.

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Introduced

First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

HOUSE BILL No. 1714

A BILL FOR AN ACT to amend the Indiana Code concerning commercial law.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 4-6-9-4 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2005]: Sec. 4. (a) The division has the
3 following powers and duties:
4 (1) The power to investigate any written consumer complaint
5 made by a nonmerchant arising from a transaction between a
6 merchant as defined in the Uniform Commercial Code and a
7 nonmerchant concerning sales, leases, assignments, awards by
8 chance, or other dispositions of goods, services, or repairs, and
9 intangibles to a person for purposes that are primarily personal,
10 familial, household, charitable, or agricultural, or a solicitation to
11 supply any of the above things. When a consumer trades in or
12 sells a motor vehicle to another consumer or nonconsumer, ~~he~~ **the**
13 **consumer** shall be deemed to be a nonconsumer and shall be
14 subject to the provisions of this chapter. The division shall have
15 no jurisdiction over matters concerning utilities subject to
16 regulation by the utility regulatory commission or by an agency of
17 the United States except that the provisions of subdivision (5)



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shall apply and except as provided in IC 8-1-29.

(2) For complaints filed after August 31, 1984, the duty to ascertain from the consumer whether the consumer consents to public disclosure by the division of the filing of the complaint, including the consumer's identity and telephone number, if any.

(3) The duty to notify the merchant of the nature of the complaint by written communication and request a written reply.

(4) Upon receipt of reply, the duty to act as mediator between the parties and attempt to resolve all complaints in a conciliatory manner. The director of the division and the attorney general have discretion whether to mediate complaints involving a de minimis amount of money.

(5) If no reply is received or if the parties are unable to resolve their differences, and no violation of federal or state statute or rule is indicated, the duty to provide the complainant with a copy of all correspondence relating to the matter.

(6) Whenever a violation of a state or federal law or administrative rule is indicated, the duty to forward to the appropriate state or federal agency a copy of the correspondence and request that the agency further investigate the complaint and report to the division upon the disposition of the complaint.

(7) The power to initiate and prosecute civil actions on behalf of the state whenever an agency to which a complaint has been forwarded fails to act upon the complaint within ten (10) working days after its referral, or whenever no state agency has jurisdiction over the subject matter of the complaint.

(8) The duty to gather information concerning a violation of IC 24-4.8 (prohibited spyware).

(b) All complaints and correspondence in the possession of the division under this chapter are confidential unless disclosure of a complaint or correspondence is:

- (1) requested by the person who filed the complaint;
- (2) consented to, in whole or in part, after August 31, 1984, by the person who filed the complaint;
- (3) in furtherance of an investigation by a law enforcement agency; or
- (4) necessary for the filing of an action by the attorney general under IC 24-5-0.5.

(c) Notwithstanding subsection (b), the division may publicly disclose information relating to the status of complaints under subsection (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7).

SECTION 2. IC 24-4.8 IS ADDED TO THE INDIANA CODE AS

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A NEW ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]:

ARTICLE 4.8. PROHIBITED SPYWARE

Chapter 1. Definitions

Sec. 1. The definitions in this chapter apply throughout this article.

Sec. 2. "Context based triggering mechanism" means a program or software based trigger that:

- (1) resides on a consumer's computer; and
- (2) displays an advertisement according to:
 - (A) the current Internet web site accessed by a user; or
 - (B) the contents or characteristics of the current Internet web site accessed by a user.

Sec. 3. "Division" means the division of consumer protection of the office of the attorney general.

Sec. 4. "Internet" has the meaning set forth in IC 5-22-2-13.5.

Sec. 5. (a) Except as provided in subsection (b), "spyware" means software residing on a computer that monitors the computer's usage and:

- (1) sends information about the computer's usage to a remote computer or server; or
- (2) displays an advertisement in response to the computer's usage, if the advertisement:
 - (A) does not clearly identify the full legal name of the entity responsible for delivering the advertisement;
 - (B) uses a federally registered trademark as a trigger for the display of the advertisement by a person other than:
 - (i) the trademark holder;
 - (ii) an authorized agent or licensee of the trademark holder; or
 - (iii) a recognized Internet search engine;
 - (C) uses a triggering mechanism to display the advertisement according to one (1) or more Internet web sites accessed by the user; or
 - (D) uses a context based triggering mechanism to display an advertisement that partially or completely covers paid advertising or other content on an Internet web site in a way that interferes with the user's ability to view the Internet web site.

(b) The term "spyware" does not include:

- (1) software designed and installed solely to diagnose or resolve technical difficulties;

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(2) software or data that reports to an Internet web site only information previously stored by the Internet web site on the user's computer, including:

- (A) a cookie;
- (B) HTML code;
- (C) Java code; or
- (D) Javascript; or
- (3) an operating system.

Sec. 6. "Usage" means the following:

- (1) A user's identifying information (as defined in IC 35-43-5-1).
- (2) An electronic mail address.
- (3) A password or an access code.
- (4) A user's submission to a computer form or Internet web site.

Sec. 7. "User" means a:

- (1) computer owner; or
- (2) person who accesses an Internet web site.

Chapter 2. Prohibited Conduct

Sec. 1. (a) Except as provided in section 2 of this chapter, a person may not:

- (1) install spyware; or
- (2) cause spyware to be installed;

on a computer.

(b) It is not a defense in an action concerning a violation of this section that a user may remove or hide an advertisement.

Sec. 2. A person may install spyware or cause spyware to be installed on a computer only if the person obtains the computer owner's consent after complying with the following requirements:

- (1) The person presents the computer owner with a full copy of a license agreement that:
 - (A) is written in plain language;
 - (B) describes each specific type of information that will be transmitted as a result of the spyware installation;
 - (C) provides a clear and representative full size example of each type of advertisement that may be delivered;
 - (D) accurately states the frequency with which each type of advertisement may be delivered; and
 - (E) for each type of advertisement delivered by the spyware, clearly describes a method by which a user may distinguish the advertisement by its appearance from an advertisement generated by other software services.

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(2) The person provides a method by which the computer owner may quickly and easily disable and remove the spyware from the computer:

(A) without affecting software or hardware on the computer that is not affiliated with the spyware; and

(B) by using an obvious and conventional method of removing the spyware.

Chapter 3. Enforcement

Sec. 1. Except as provided in sections 5 and 6 of this chapter, one (1) or more of the following persons who are adversely affected by a violation of this article may bring a civil action against a person who caused or committed the violation:

(1) An Internet web site owner or registrant.

(2) A trademark or copyright holder.

(3) An authorized advertiser on an Internet web site.

Sec. 2. In an action brought under this chapter, a person may:

(1) obtain an injunction, including a temporary restraining order; and

(2) recover the greater of:

(A) actual damages; or

(B) ten thousand dollars (\$10,000) for each separate violation of this article.

Sec. 3. In addition to the remedies available under section 2 of this chapter, a court may award the following:

(1) An amount not to exceed three (3) times the actual damages of the person adversely affected by the violation, if the violation of this article was knowing or intentional.

(2) The costs of the action.

(3) Reasonable attorney's fees.

(4) Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through (3) and are incurred by the person adversely affected to:

(A) file papers and attend court proceedings or have an employee or agent file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.

(5) A reasonable amount to compensate the person adversely affected for time used to:

(A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

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(B) travel to and from activities described in clause (A).

(6) Actual direct and indirect expenses incurred by the person adversely affected to compensate employees and agents for time used to:

(A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) travel to and from activities described in clause (A).

(7) All other reasonable costs of collection.

Sec. 4. Each unauthorized display of an advertisement described in IC 24-4.8-1-5(a)(2) constitutes a separate violation of this article.

Sec. 5. A person may not bring a civil action for a violation of this article against an Internet service provider for the routine transmission of:

(1) security information; or

(2) information that contains an advertisement that violates this article.

Sec. 6. A person may not bring a class action under this article.

Chapter 4. Duties of the Attorney General

Sec. 1. The attorney general shall:

(1) establish a procedure by which a person may report a violation of this article to the division, including the use of:

(A) an Internet web site; and

(B) a toll free telephone number; and

(2) make a recommendation to the legislative council in accordance with IC 4-6-9-6 if the attorney general believes that this article requires amendment.

A recommendation under subdivision (2) must be in an electronic format under IC 5-14-6.

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